United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

23

BRIEF FOR APPELLANT
IN FORMA PAUPERIS

IN THE

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 24,083

UNITED STATES OF AMERICA,
Appellee

v.

CLIFTON W. HOLLAND,
Appellant

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Noel Hemmendinger
1000 Connecticut Avenue
Washington, D. C. 20036
Counsel for Appellant Holland
(Appointed by this Court)

QUESTIONS PRESENTED

1. Whether the Trial Court erred in denying appellant Holland's Motion for Judgment of Acquittal because the evidence was legally insufficient to warrant a jury finding that he had violated the Federal Narcotics Laws?

2. Whether the admission of a prior conviction for the same offense, ruled inadmissible prior to appellant's testimony and allowed thereafter, was prejudicial error?

3. Whether the admission of a prior inconsistent oral statement of a witness was proper for impeachment purposes where witness denies having made the statement and where the statement has great prejudicial effect as the only direct evidence on the issue of guilt or innocence?

4. Whether the Trial Court erred in refusing to admit only part of an affidavit, where the remainder contained incompetent evidence which was highly prejudicial?

This case has never been before this Court for review under the same or similar title.

References to Rulings - None

UNITED STATES OF AMERICA,
Appellee

v.

CLIFTON W. HOLLAND,
Appellant

NO. 24,083

TABLE OF CONTENTS

TABLE OF CONTENTS (Continued)

CASES CITED

TABLE OF CONTENTS (Continued)

JURISDICTIONAL STATEMENT

Appellant was tried in December, 1969, in the United States District Court for the District of Columbia and was convicted of violations of 26 U.S.C. 4704(a) and 21 U.S.C. §174. The Trial Court allowed petitions for leave to appeal in forma pauperis. This Court has jurisdiction over the appeal by virtue of 28 U.S.C. §1291.

STATEMENT OF FACTS

This is an appeal from a conviction for violations of the Federal Narcotics Laws pursuant to 26 U.S.C. 4704(a) and 21 U.S.C. §174. The jurisdiction of this Court is founded on 28 U.S.C. §1291.

In the early morning of March 22, 1968, three officers of the Washington Police Department went to 1444 Fairmont Street, Northwest, Apartment No. 3, Washington, D.C., to execute a search warrant. After knocking on the door to the bedroom of the apartment and announcing themselves, the officers forced the door and entered. Appellant Holland was observed lying on the floor between the bed and the wall. Miss June King, the lessee, was sitting at the foot of the bed. Both were undressed and the bed had been used. (Tr. 41, 42)

Mr. Holland and Miss King were told to sit at the foot of the bed; the warrant and police identification were shown to them. The apartment was searched and 202 capsules of a white powder, later determined to contain heroin, were discovered in an envelope on top of a dresser, located on the side of the room opposite the bed. In response to questions, Mr. Holland denied any knowledge of the drugs. The appellant and Miss King were then taken to the police station. Miss King later pleaded guilty and the two cases were severed. (Tr.41,107)

At trial, the appellant testified that he had no knowledge of the drugs; Miss King, testifying for the defense, stated that the drugs were hers and that appellant had no knowledge of them. (Tr. 147, 145)

The appellant was found guilty of illegal possession of narcotics in two counts. Count one was under 26 U.S.C. 4704(a) and Count two was under 21 U.S.C. 174. On February 20, 1970, he was sentenced to from two to eight years on Count one, and on Count two to five years — the sentences to run concurrently. It is from these convictions that this appeal is taken.

STATUTES INVOLVED

United States Code Annotated, Title 26, Section 4704(a):

It shall be unlawful for any person to purchase, sell, dispense, or distribute narcotic drugs except in the original stamped package or from the original stamped package; and the absence of appropriate taxpaid stamps from narcotic drugs shall be prima facie evidence of a violation of this subsection by the person in whose possession the same may be found.
(At 205)

United States Code Annotated, Title 21, Section 174:

Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than $20,000. For a second or subsequent offense (as determined under section 7237(c) of the Internal Revenue Code of 1954), the offender shall be imprisoned not less than ten or more than forty years and, in addition, may be fined not more than $20,000.

Whenever on trial for violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.
(At 104)

District of Columbia Code, Title 14, Section 305

A person is not incompetent to testify, in either civil or criminal proceedings, by reason of his having been convicted of crime. The fact of conviction may be given in evidence to affect his credibility as a witness, either upon the cross-examination of the witness or by evidence aliuned; and the party cross-examining him is not bound by his answers as to such matters. To prove the conviction of crime the certificate, under seal, of the clerk of the court wherein proceedings containing the conviction were had, stating the fact of the conviction and for what cause, is sufficient.
(At 754)

STATEMENT OF POINTS

1. In denying appellant Holland's Motion for a Judgment of Acquittal, the Trial Court committed reversible error because the evidence was legally insufficient to warrant submission to the jury of the case against him for illegal possession of narcotics.

2. The Trial Court erred in admitting a prior Harrison Narcotics Act conviction to impeach appellant's testimony where the Court had ruled prior to such testimony that the conviction would not be allowed, and where the extreme prejudice far outweighs any probative value on the issue of credibility.

3. The Trial Court erred in admitting a prior inconsistent oral statement for the purpose of impeaching the witness June King, where the witness denied ever having made the statement and where the jury would unavoidably consider the statement as substantive evidence with resulting prejudice outweighing any possible relevance and where such impeaching statement is the only direct evidence on the issue of guilt or innocence.

4. The Trial Court erred in refusing to admit part of an affidavit, offered for the purpose of supporting an impeached witness, where the remaining part contained mention of a gun, which evidence had been ruled inadmissible because incompetent, irrelevant and highly prejudicial.

SUMMARY OF ARGUMENT

I

The Trial Court erred in allowing the case to go to the jury and in denying the defense motion for acquittal at the close of the case for the prosecution. The evidence that appellant had been in the apartment at the time of the search and discovery of the narcotics is insufficient to establish the dominion and control over the drugs necessary for possession.

II

The Trial Court erred in allowing evidence of a prior narcotics conviction to impeach the testimony of the appellant, where the conviction had been previously ruled inadmissible and where the prejudicial effect far outweighed the probative relevance to credibility.

III

The Trial Court erred in allowing evidence of an alleged prior inconsistent statement by the key witness for the defense, where the witness denied having made the statement, where the statement is highly untrustworthy, and where the statement is the only direct evidence of the guilt of the appellant.

IV

The Trial Court erred in refusing a part only of an affidavit where the remainder of the affidavit contained incompetent and prejudicial evidence which had previously been ruled inadmissible by the Court.

ARGUMENT

I

The Trial Court erred in refusing to grant the defense motion for acquittal at the close of the prosecution's case

Under 26 U.S.C. 4704(a) a presumption of guilt arises from the unexplained possession of a narcotic drug not having tax-paid stamps. Vick v. United States, 304 F. 2d 379 (D.C. Cir. 1962). Under 21 U.S.C. 174 unexplained possession is also sufficient to raise a presumption of guilt. At the close of the case for the prosecution, defense counsel moved for judgment of acquittal on the grounds that appellant's possession of the narcotics found in the apartment of June King had not been sufficiently established. The motion was denied. It is submitted the Trial Judge erred in refusing to grant the motion and in allowing the case to go to the jury.

The case for the prosecution rested upon the fact that appellant was in the apartment of June King at the time of the early morning search, and that he had spent the night there. No narcotics were found in the actual, physical possession of the appellant. He was found lying on the floor between the bed and the wall; the narcotics were found on the other side of the room on top of the dresser. (Tr. 41, 42) Furthermore, Miss King testified that appellant had no knowledge of the drugs and that

they had been hidden at the time he arrived at the apartment and remained hidden until after he had fallen asleep. (Tr. 145, 146) From the mere presence of the appellant in the apartment, the prosecution sought to make a case for the jury. This is insufficient.

In United States v. Landry, 257 F. 2d 425 (7th Cir. 1958) the appellant had been found guilty of narcotics violations under 21 U.S.C. 174 and 26 U.S.C. 4704(a). In Landry, as in the present case, the government relied entirely upon its contention that it had proved possession by the defendant. The evidence indicated that Landry was living in an apartment with one Delores Dandridge when the apartment was entered by police officers and heroin was found, both on the person of Delores and in the bedroom. The government argued that because Landry had been living in the apartment, and because of the bond of affection between Delores and himself, "he necessarily had access to the drugs, with an opportunity to control them at will and, therefore, had possession." On appeal, this argument was dismissed as "speculative" (at 431) and the judgment was reversed.

In the present case the prosecution made an argument equally speculative. In an effort to establish that the appellant had dominion and control over the narcotics, the prosecution attempted to show appellant's knowledge of the apartment and its

contents through the testimony of Detective Norman, who testified that appellant had taken a shirt from the closet and some clean socks and underwear from the dresser. (Tr. 49) However, this testimony was contradicted by both the appellant and Miss King. (Tr. 123, 147) Officer Norman did not know how many pairs of socks or underwear were in the drawer, and further testified that he had never mentioned the presence of these clothes before, either in his written case report, at the preliminary hearing, or before the grand jury. (Tr. 61, 62) The other officers at the scene were not called as witnesses to corroborate the testimony of Detective Norman.

It is clear that such evidence does not even reach the level of probability found insufficient in the Landry case. Other courts have held that mere proximity to the drug, Williams v. United States, 290 F. 2d 451 (9th Cir. 1961), or mere association with the person who does control the drug or the property on which it is found, United States v. Mills, 293 F. 2d 609, 611 (3rd Cir. 1961) and Evans v. United States, 257 F. 2d 121 (9th Cir. 1958), are insufficient to establish possession and raise the presumption of guilt. The words of the court in Landry are equally applicable here:

> "The provision which raises a presumption of guilt from the fact of unexplained possession, and thereby in effect shifts the burden of proof to a defendant, is drastic, no doubt designed to meet a menacing situation. Congress has created a presumption upon proof of the existence of a fact, and now the government would have the Court presume the fact. There may be a case where a court would be justified in so doing but, if so, this is not it."
>
> (At 432)

The use of the presumption is "so fraught with danger that the courts must scrutinize its use with all diligence." Guevara v. United States, 242 F. 2d 745 (5th Cir. 1957). It is submitted that such diligence was not exercised here, and that the Trial Court erred in denying the Motion for Acquittal

ARGUMENT

II

The Trial Court erred in allowing evidence of a prior Harrison Narcotics Act conviction

. The basic law in the area of the admissibility of prior convictions was set out in Luck v. United States, 348 F. 2d 763 (D. C. Cir. 1965), which interpreted 14 D. C. Code §305 (1961) and held that the admission of prior convictions was discretionary with the Trial Judge.

> "The Trial Court is not required to allow impeachment by prior conviction every time a defendant takes the stand in his own defense. The statute, in our view, leaves room for the operation of a sound judicial discretion to play upon the circumstances as they unfold in a particular case."
>
> (At 768)

The Court in Luck proposed two major guidelines for the exercise of the Trial Court's discretion. Evidence of a prior conviction should not be allowed where,

> "the cause of truth would be helped more by letting the jury hear the defendant's story than by the defendant's foregoing that opportunity because of the fear of prejudice found upon a prior conviction,"

or where,

> "the prejudicial effect of impeachment far outweighs probative relevance of the prior conviction to the issue of credibility."
>
> (At 768)

It is submitted that in the present case the Trial Court erred in allowing evidence of a prior conviction, under either of these guidelines.

At the trial of the present case a Luck hearing was held (Tr. 88-95) and it was determined that the prior narcotics conviction would not be allowed for impeachment purposes. One of the major reasons for this type of hearing is to enable the appellant to foresee the consequences of taking the stand, or conversely, to encourage him to tell his side of the story without fear of unduly prejudicial surprise. As noted in the Luck case:

> "A defendant who is considering whether or not to testify in his own behalf may want, if possible, to know to what extent the trial judge will permit him to be impeached by his past record." 348 F. 2d 763, 768 n. 7.

The results which may come about from undue fear of impeachment are evident in the case of Smith v. United States, 359 F. 2d 243 (D. C. Cir. 1966), where the defendant's failure to take the stand allowed the jury to draw inferences concerning his guilt. If his decision had been motivated by fear of impeachment by prior convictions, "appellant's alleged guilt may have been largely fixed by his proven guilt of other and past crimes." (At 244)

At trial, it was necessary for appellant to consider whether or not to testify in his own behalf. He was charged with possession of narcotics, which had been found in the apartment of June King. He had been there at the time of the police search, and he had been there before. If he had declined to take the stand to explain his presence and the nature of his relationship with Miss King, the jury could have drawn inferences concerning his knowledge and possession of the drugs. At the same time, the defense was aware of the effect any mention of the prior conviction would have on the jury: "If he did it before, he probably did so this time." Gordon v. United States, 383 F. 2d 936, 940 (D. C. Cir. 1967) The appellant's decision to testify was, therefore, influenced by the Court's ruling that the prior narcotics conviction would not be used. (Tr. 88-95)

Immediately following appellant's testimony, the first question of the prosecution was, "Have you ever possessed drugs?" (Tr. 107) The questions following were similar, giving the appellant the Hobson's choice of either answering in the affirmative, thus in effect admitting a prior narcotic violation, or in the negative allowing the prosecution to lay the groundwork for impeachment. He denied that he had

ever possessed drugs. Following this, over objection of counsel for appellant and a request for a mistrial (Tr. 110), the prosecution was allowed to impeach appellant Holland with the prior conviction. (Tr. 111) The course the examination took thus amounted to entrapment, placing the appellant in an utterly impossible situation. The reason given by the Trial Judge that the defense had "opened the door" was based on an inaccurate recollection of the record:

> "Mrs. Chalker: Your honor, I specifically did not ask the defendant anything of that sort.
> "The Court: He voluntarily --
> "Mrs. Chalker: Your honor, the only thing that came out on direct examination is he tried to help June King get off drugs.
> "The Court: No, he said he didn't know anything about drugs.
> "Mrs. Chalker: Your honor, he didn't say that.
> "The Court: That he never used?
> "Mrs. Chalker: He said that in response --
> "The Court: No, to your own question. You are the one that brought it out. Yes, it can be used."
> (Tr. 110)

The Trial Judge was, in fact, in error. Appellant Holland had not stated that he had no knowledge of drugs. He stated to the contrary -- that he knew of the symptoms of drug addiction, but that he "never liked any part of drugs." (Tr. 101) He did not say either that he had no knowledge of narcotics or that he never possessed them.

It has been recognized by text writers,[1] the Supreme Court,[2] and in judicial opinion generally,[3] that no jury is able to distinguish between substantive and impeachment evidence.

The case of Gordon v. United States, 383 F. 2d 936 (D. C. Cir. 1967) gave a further refinement to the Luck guidelines for exercise of judicial discretion in allowing evidence of prior convictions, particularly in balancing probative value against prejudicial effect. The following points were made.

First, prior convictions allowed for impeachment purposes should be of crimes relevant to the honesty of the witness, such as deceit, fraud, cheating, stealing. Crimes of violence, or traffic offenses, were given as examples having little relevance to truthfulness. Here the prior conviction was under the Harrison Narcotics Act for possession of drugs; it is difficult to see in what manner simple possession might have on the general tendency to tell the truth.

Second, where the prior offense was the same as that charged in the present proceeding, there is substantial risk that the jury will consider it as substantive evidence. "If he did it before, he probably did so this time." For this reason

---

1/ McCormick, Evidence, at 77 (1954).
2/ Jackson v. Denno, 378 U.S. 368 (1964).
3/ Cases cited in McCormick, Evidence, at 77, n. 14, 15, 16, 17 (1954)

prior convictions of the same or similar crimes "should be admitted sparingly." Gordon, supra, at 940. Of course, in the present case the prior conviction and the present charge are for precisely the same thing: possession of narcotics in violation of the Harrison Narcotics Act. The discretion of the Trial Judge, therefore, should be the more circumspect, and the prior conviction should be allowed only for the most compelling reasons. To allow the prosecution to lay the foundation by questions such as, "Have you ever possessed narcotics?" and finally to impeach his testimony by the prior record -- all on the basis of an expressed dislike of drugs in the direct testimony -- is to violate the letter and the spirit of the Luck and Gordon decisions.

It is, of course, true that the Court of Appeals has upheld the Trial Judge in other instances where prior convictions have been allowed to impeach the credibility of a defendant. The most frequent cases concern appeals from a decision, prior to testimony by the defendant, to allow such testimony. Brooke v. United States, 385 F.2d 279, (D. C. Cir. 1967); Evans v. United States, 397 F.2d 675 (D. C. Cir. 1968); Hood v. United States, 365 F.2d 949 (D. C. Cir. 1966). Still other

cases differ because the Luck question was not sufficiently argued, (Williams v. United States, 290 F. 2d 451 (D.C. 9th Cir. 1968); Blakney v. United States, 225 A. 2d 654 (D.C. App. 1967)), was raised too late, Williams, supra, or not at all, Gordon, supra.

In the instant case none of the foregoing factors are present. A Luck hearing was held, where it was decided to exclude the prior narcotics conviction after a thorough discussion of the defendant's record and the Luck - Gordon guidelines.

ARGUMENT

III

The Trial Judge erred in admitting a prior inconsistent statement of June King

The key issue in the instant case is whether the appellant, Clifton Holland, possessed the narcotic drugs found in the apartment of one June King on March 22, 1968. On March 29, 1968, Miss King made a sworn statement that the drugs were hers. (Tr. 170) On October 29, 1969, she pleaded guilty to possession of the drugs. (Tr. 139) During the trial of appellant Holland for possession of the same narcotics, Miss King testified that the drugs were in her sole possession, that she had hidden them in her apartment, and that appellant Holland had no knowledge of them. (Tr. 145)

Over the strong objection of appellant, the prosecution was allowed to introduce testimony that she had made an oral statement to a member of the police department at the precinct on the day of her arrest to the effect that the drugs belonged only to the appellant Holland. The witness denied ever having made the statement (Tr. 196, 166). It is submitted that the Trial Court erred in admitting evidence of the alleged inconsistent statement. While evidence of prior inconsistent statements are normally allowed to impeach a witness, the facts of

this case warrant particularly close scrutiny. Exclusion of the statement in question is required to preserve appellant's right to a fair trial.

The statements are highly untrustworthy. Miss King has denied ever having made them. (Tr. 166) There is, furthermore, no signed statement that the drugs belonged to appellant Holland; Miss King is said to have responded to questions asked by a police officer, who typed her answers. She was not asked to sign . (Tr. 200) Assuming, however, that such a statement was made, the surrounding circumstances are most important. The raid on her apartment occurred between 6:00 and 6:30 a.m. The witness was found in bed with appellant Holland; the door to her apartment was broken down and her apartment searched. (Tr. 42) Immediately following this she was taken to the police station, and at a time when she had not yet recovered from the shock of her arrest, feeling ill and in need of more drugs (Tr. 167), she is said to have made a statement totally exculpating herself, in effect that she was not guilty of any offense and all the guilt was appellant Holland's.

The inherent untrustworthiness of statements such as the one here in question have been compared to that seen in coerced confessions. 3 Wigmore on Evidence §822 pp. 246-47.

> "The principle upon which a confession is treated as sometimes inadmissible is that under certain conditions it becomes untrustworthy as testimony. The principle is the same as that upon which statements based on memoranda, or testimony given while intoxicated, or testimony given upon the suggestion of a leading question are treated as dubitable and may under circumstances be excluded." (Emphasis added.)

The alleged prior statement of June King, while totally lacking in trustworthiness, has enormous prejudicial effect on the defense. It is directly conclusory on the key disputed issue in the case and is the only direct government evidence on the issue. No amount of cautionary instructions will eliminate the substantial risk that the jury will consider the statement as substantive evidence in determining the appellant's guilt. The Supreme Court has explicitly indicated its awareness of the unreality of pretending the jury can perform the mental gymnastics required to consider the evidence for impeachment purposes only.

> "As was recognized in Jackson v. Denno, supra, there are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations, of the jury system cannot be ignored." Bruton v. United States, 391 U.S. 123 (1968)

Such a context is presented here where the powerfully incriminating extrajudicial oral statements of the only person other than the appellant able to testify as to the facts in dispute is spread

before the jury under the guise of impeachment. Any instruction limiting the consideration of the jury is, it is generally agreed, mere "verbal ritual" and presents a distinction which most jurors cannot understand. McCormick, Evidence, at 77 (1954)

Generally, the substantial certainty that the jury will consider the prior statement as substantive evidence may not be harmful; here, however, where it is, to repeat, the only direct evidence of appellant's guilt, the prejudicial effect is devastating. Such an effect has been recognized by the courts, and has led to reversal in analogous situations.

In United States v. Block 88 F. 2d 618 (2nd Cir., 1937), a witness for the prosecution had made a prior statement, before a grand jury, which essentially established the guilt of the appellant. On the stand he denied the truth of the statements, and refused to repeat them. The prosecution read the statement to him, eliciting only repeated denials and objections by the defense, thus managing to insert the statement into the record. On appeal, Learned Hand writing for the majority, the judgment was reversed.

> "In other affairs such a statement would be accepted as evidence to be weighed against the retraction, and nobody would think it an injustice to make use of it. But we are not free so to make over the law; we cannot sustain a conviction based upon unsworn evidence. For this reason, the conviction of Levy cannot stand, even though there was enough other evidence to sustain a verdict against him."
>
> (At 620)

Block stands for a generally recognized principle: where the only evidence of some essential fact is a previous statement by a witness who denies, forgets or claims to forget the statement, the prosecution's case must fail. Bridges v. Wixon, 326 U.S. 135, 150 (1945) Here, in addition, the statement when made was self-serving; it was made under the pressure of highly coercive circumstances; the declarant denies the veracity of the content of the statement, and the declarant denies making the statement. To allow the statement as evidence, where the prejudicial effect so clearly outweighs the probative relevance to credibility, and where the government's case must heavily rely on an improper effect of the statement on the jury, is to deny the appellant a fair and unprejudiced trial.

ARGUMENT

IV

The Court erred in refusing to admit only part of an affidavit when the remainder of the affidavit contained prejudicial and incompetent evidence

In order to rehabilitate the witness June King, who testified that she was in sole possession of the drugs, and who had been impeached by use of a prior inconsistent statement, the defense attempted to introduce part of a signed, notarized affidavit made by the witness, which consisted of a prior consistent statement made one week after arrest. The defense did not wish to introduce the entire affidavit because it contained a reference to a gun that could have had a prejudicial effect on the jury. This prejudicial effect was recognized both by the original prosecutor in the case, who agreed not to introduce evidence about the gun, and the judge, who ruled that the gun could not be introduced in any manner. (Tr. 77, 151)

The defense argued at trial that there was no need to admit an entire document into evidence when parts of that document contained prejudicial and incompetent material. The Court's response was "you can't have your cake and eat it, too." (Tr. 172) The general rule, however, is clearly to the contrary. While the prevailing practice is to allow one party to bring in other parts of a document introduced by the other party during

his part of the trial (on the theory that proponent opened the door), this is not the case

> "where the remainder is incompetent, not merely as to form as with secondary evidence or hearsay, but because of its prejudicial character. The Trial Judge should exclude if he finds that the danger of prejudice outweighs the explanatory value."
> McCormick, Evidence at 132 (1954)

This is repeated in 20 AmJur. 770, 771, where it is stated that an adversary may demand all of a statement

> "so far, at least, as it bears upon, modifies or explains the part that was admitted on behalf of his opponent, and subject to the limitation that such remaining parts are relevant to the issue and competent under rules of evidence to prove them."

It is submitted that evidence of the existence of a gun in the apartment neither bears upon, modifies, nor explains that part of the affidavit offered by the defense. It is clear that the only potential relevance of the presence of the gun and appellant Holland's knowledge of it, would be the inference from it of a general knowledge on appellant's part of the apartment and its contents. (Tr. 153, 180) This is at best tangential relevance to the issue of possession of narcotics which is clearly outweighed by the prejudicial effect on the appellant.

It is hornbook law that prejudice is to be weighed against probative value on the issue of credibility. 1 Wigmore, Evidence §29(a)

Rule 45 of the Uniform Rules of Evidence sets forth the following points to consider in the exercise of jucidial discretion:

1. The danger that the facts offered may unduly arouse the jury's notions of prejudice, hostility, or sympathy;

2. The probability that proof and answering evidence that it provokes may create a side issue that will distract the jury or take up an undue amount of time; and

3. The danger of unfair surprise to the opponent who has no reasonable grounds to anticipate this development and is unprepared to meet it.

All of these dangers are present is this case, particularly the prejudicial effect which, to emphasize again, had been recognized by the prosecution (resulting in an agreement prior to trial not to introduce it) and understood by the judge, who had ruled that evidence of a gun would be inadmissible as to the appellant. The ruling here, that the witness could be asked questions concerning the gun,clearly put the defense in an impossible position, as stated on page 172 of the Transcript:

Rule 45 of the Uniform Rules of Evidence sets forth the following points to consider in the exercise of jucidial discretion:

1. The danger that the facts offered may unduly arouse the jury's notions of prejudice, hostility, or sympathy;

2. The probability that proof and answering evidence that it provokes may create a side issue that will distract the jury or take up an undue amount of time; and

3. The danger of unfair surprise to the opponent who has no reasonable grounds to anticipate this development and is unprepared to meet it.

All of these dangers are present is this case, particularly the prejudicial effect which, to emphasize again, had been recognized by the prosecution (resulting in an agreement prior to trial not to introduce it) and understood by the judge, who had ruled that evidence of a gun would be inadmissible as to the appellant. The ruling here, that the witness could be asked questions concerning the gun,clearly put the defense in an impossible position, as stated on page 172 of the Transcript:

> "Mrs. Chalker: What you are forcing me to do is either give up the whole thing or have statements that are inadmissible pertain to a matter that is highly prejudicial, that is, a gun, also brought in."

The effect was to deny appellant the right to rehabilitate and support a witness whose testimony was absolutely crucial to the defense.

CONCLUSION

It is appellant's belief that each of the four errors discussed above, taken singly, is sufficient in itself to require reversal of his convictions. In the alternative, however, it is urged that this Court consider their cumulative effect, which created an atmosphere so prejudicial to the defense that it precluded a fair trial. For the reasons given above, it is respectfully submitted that the appellant's conviction be vacated.

Respectfully submitted,

Noel Hemmendinger
Counsel for Appellant

INDEX

TABLE OF CASES

OTHER REFERENCES

* Cases chiefly relied upon are marked by asterisks.

ISSUES PRESENTED *

In the opinion of appellee, the following issues are presented:

I. Should a motion for judgment of acquittal have been granted at the close of the Government's case on the ground that there was insufficient evidence of appellant's possession of narcotic capsules, where among other things, the capsules were found in open view on a dresser in a room occupied solely by appellant and another?

II. Was appellant properly impeached with a narcotics conviction resulting from a plea of guilty when he ventured far beyond a mere denial of the instant narcotic offenses, and made the sweeping claim that he had never possessed narcotics in his life?

III. Could the Government properly impeach a defense witness (June King), the other occupant of the room in which narcotic capsules were found, with a prior inconsistent statement after she testified that all the narcotic capsules found in the room were hers, where the witness had shortly after arrest claimed the opposite, *i.e.*, that all the capsules were appellant's, and subsequently had been allowed to plead guilty to a misdemeanor offense?

IV. Was there any prejudice from the trial court's ruling to allow the Government use of an affidavit proffered by the defense as a prior consistent statement of witness June King, where after the affidavit was withdrawn upon the court's ruling, the same evidence which this mode of proof purported to establish was more convincingly presented when the trial court allowed the defense to call a witness (appellant's wife) in surrebuttal?

---

* This case has not previously been before this Court.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,083

UNITED STATES OF AMERICA, APPELLEE

v.

CLIFTON W. HOLLAND, APPELLANT

Appeal from the United States District Court for the District of Columbia

---

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

After trial by jury before Judge Leonard P. Walsh December 17-19, 1969 on a two count indictment charging violations of 26 U.S.C. § 4704(a) (purchase, sale, or receipt of narcotic drugs not in the original stamped package and without the appropriate tax-paid stamps) and violation of 21 U.S.C. § 174 (facilitation of concealment and sale of narcotic drugs, knowing the same to have been imported contrary to law), appellant was found guilty of both charges.[1] Appellant was sentenced

[1] Appellant was jointly indicted with one June King, who prior to

to terms of imprisonment of two to eight years for the first charge and concurrently with that to five years for the second charge.

The Government's Case

On March 22, 1968 around 6:00 o'clock in the morning, Detective Winston Norman of the Narcotics Squad and two other police officers went to 1444 Fairmont Street, N.W., apartment 3 (second floor), to execute a search warrant. Upon knocking at the door and announcing authority and purpose in response to an inquiring male voice, Detective Norman heard movement within the apartment. After knocking and giving the same announcement again, unavailingly, the door was forcibly opened (Tr. 36-38, 40, 53-54). Appellant was found undressed lying on the floor between a bed and the wall with his hand in an open drawer of a dresser.[2] The other occupant of the apartment, June King, was found sitting undressed in a chair at the foot of the bed with a bedspread wrapped around her (Tr. 41-42, 48-49). On top of a dresser, a cream colored envelope was found with 202 capsules of a white powder later determined to contain heroin (29.3 per cent) (Tr. 42-43, 65). After appellant removed a shirt and a suit from a closet and dressed, other men's apparel remained in the closet. Several pairs of men's underwear and socks remained in a dresser drawer after he removed some to wear (Tr. 49-50, 57-58). Both appellant and June King were arrested and taken to the Narcotics Squad office of the police department (Tr. 49).

Defense Evidence

Appellant Holland, age 43, testified that on the occasion of his arrest he was in the apartment of June King

---

his trial pleaded guilty to a misdemeanor (violation of the Uniform Narcotic Act).

[2] In bench conference, it was indicated the drawer contained a gun (Tr. 75).

where he had gone between 12:30 and 1:30 a.m. to retire for the night after a trying day of shooting pool, his primary means of income (Tr. 101-103, 105, 121). Although married and maintaining a residence with his wife at 1958 Third Street, N.W., appellant occasionally stayed weekend nights with Miss King whom he met two or three months prior to the instant arrest (Tr. 97-100). He knew from the beginning that Miss King was a narcotic addict and had tried to get her to stop taking narcotics (Tr. 116-117, 119). However, on the occasion of his arrest in her apartment, he was not aware that there were any narcotics there until they were discovered by the police (Tr. 106-107). He denied possessing these drugs, and further ever having any connection with drugs in his life[3] although he was raised in areas that exposed him to the drug traffic and other vices (Tr. 107-108).

Thelma Holland, appellant's wife, testified that she and appellant lived at 1958 Third Street, N.W. and that appellant seldom stayed out all night—perhaps once a week (Tr. 132-133). She did not meet June King until after appellant was arrested (Tr. 135).

June King, who had been indicted with appellant, but entered a plea of guilty to a misdemeanor, testified that she was a narcotics addict taking 20 capsules a day and that all of the capsules (202) found in her apartment in which she lived alone, belonged to her[4] (Tr. 139-140). She obtained the drugs from a seller ("Jimmy Jones") who lived in the same apartment building under an ar-

---

[3] Appellant was impeached with a prior conviction for violating the Harrison Narcotic Act (26 U.S.C. § 4704(a)) based upon a plea of guilty in 1967 when he denied any association with narcotic drugs. Despite the plea, he undertook to explain, actually deny, this association (Tr. 112-114). He was also impeached with a prior conviction for unauthorized use of a vehicle based upon a plea of guilty in 1967 also which the trial court in its discretion, as with another conviction which was not used, had already decided to allow (Tr. 113, 125).

[4] On her guilty plea she admitted possessing two capsules (Tr. 176).

rangement whereby he would allow her to safe-keep the drugs for him to avoid their being stolen and she could satisfy her habit from them (Tr. 143). She had the narcotics concealed in a window in her apartment (Tr. 145). After appellant arrived, watched television a while, and then fell asleep, she left her apartment and went to a third floor bathroom where she concealed her narcotics paraphernalia and "took off". She returned to her apartment, fell asleep, and did not awake until she heard the police forcibly entering her apartment. The police searched and found her narcotic drugs, about which she stated appellant had no knowledge (Tr. 145-146). Moreover, she stated that appellant never brought clothes to her apartment, nor did other men that had occasion to visit her. Any men's clothing that was there belonged to her 13 year old brother (Tr. 146-147). Both she and appellant were arrested and taken to the Narcotics Squad office where she was advised of her rights (Tr. 163-164). In cross-examination, she disavowed making any statement at that time as to whom the capsules belonged, certainly any statement that they belonged to appellant, or that he had started her on narcotics (Tr. 159, 160-161, 165-166).[5]

Some Rebuttal

Detective Norman was recalled to testify, among other things, that Miss King had told him at the squad office within two hours of the arrest that appellant started her on narcotics and that the 202 capsules found in her apartment were brought in by appellant and that they belonged to him (Tr. 196).

---

[5] On re-direct, appellant's counsel in anticipating rebuttal evidence that Miss King told police that narcotics capsules belonged to appellant, undertook to have Miss King read from a portion of a signed statement purporting to show that she had made a prior consistent statement to the effect she owned all the capsules found in her apartment (Tr. 170-171). When the court ruled to allow the Government to use other portions of the statement, the proposed evidence was withdrawn (Tr. 166-176).

Surrebuttal

Appellant's wife, Mrs. Holland, was recalled and testified that June King called her after appellant was arrested and that she wanted to see appellant's attorney. Later (about two weeks after the instant arrest) she did appear in the office of attorney Myer Koonin and did sign a sworn statement indicating the capsules in the instant seizure were hers (Tr. 208-209).[6]

ARGUMENT

I. The motion for judgment of acquittal made after presentation of the Government's case in chief was properly denied.

The Government's evidence showed that appellant and June King were the only occupants of the room where narcotics were seized on a dresser top, after police entry pursuant to a search warrant. Among other incriminating circumstances, such as men's clothing in a closet, both were undressed and in bed at this early morning hour (6:00), reasonably indicating their presence there was neither fortuitous nor brief, but residential. Had it been otherwise, it would still be a jury question. Both could be in possession of the contraband, and nothing more was required as a matter of law to have this case go to the jury, contrary to appellant's assertion (Brief, pp. 7-11). *Curley* v. *United States*, 81 U.S. App. D.C. 389, 160 F.2d 229, *cert. denied*, 331 U.S. 837 (1947); *Crawford* v. *United States*, 126 U.S. App. D.C. 156, 375 F.2d 332 (1967). Even if this were a close case on the question of possession, though it was clearly not, it would be one for the triers of fact. *Thompson* v. *United States*, 132 U.S. App. D.C. 38, 405 F.2d 1106 (1968).

---

[6] This same matter counsel had sought to establish by having June King read from her signed statement, but this mode of proof was dispensed when it was determined that the prosecutor would be allowed to use the statement also. See note 5, *supra*.

II. The trial court did not err in allowing impeachment of appellant with a prior conviction for violation of the Harrison Narcotics Act.

Tr. 68, 88-93, 101, 107-109, 111-114)

In a *Luck*[7] hearing, the trial court ruled that the prosecutor would be allowed to impeach appellant's testimony with two convictions, robbery and unauthorized use of a vehicle, and that two other convictions, including violation of the Harrison Narcotics Act, could not be used for this purpose (Tr. 68, 88-93). Appellant was impeached with the unauthorized use of a vehicle conviction (Tr. 113-114) and for reasons unrelated to the *Luck* ruling, with the narcotics conviction (Tr. 111-112).[8] The latter impeachment occasions the instant complaint (Appellant's brief, pp. 11-17), which we view wholly without proper grounds.

Appellant's sole reliance is on the *Luck-Gordon*[9] rationale, to the effect that in exercising discretion the trial court should consider whether impeachment would discourage the defendant's testimony or would produce prejudice far in excess of the probative relevance of such impeachment on the issue of credibility. Of course, appellant did testify here and interposed a strong denial to the possession of the narcotics (Tr. 107). More importantly however appellant claimed further on direct examination that he was never associated with narcotic drugs, explaining "I never liked any parts of drugs" (Tr. 101). This became on cross-examination a sweeping denial that he never had any connection with drugs in his life (Tr. 108-109). Earlier exclusion of the prior narcotics conviction was not a license for appellant to perjure himself, and introduction of evidence showing

---

[7] *Luck* v. *United States*, 121 U.S. App. D.C. 151, 348 F.2d 763 (1965).

[8] Though still permitted, it appears that the prosecutor chose not to use the robbery conviction at all.

[9] *Gordon* v. *United States*, 127 U.S. App. D.C. 343, 383 F.2d 936 (1967), *cert. denied*, 390 U.S. 1029 (1968).

he *pleaded guilty* to the narcotics offense in March 27, 1968, was therefore entirely proper.[10] *Walder* v. *United States*, 347 U.S. 62 (1954) (admission of illegally obtained evidence of prior possession of narcotics was upheld as proper impeachment[11] of the defendant's denial that he had ever had narcotics in his possession); *Tate* v. *United States*, 109 U.S. App. D.C. 13, 283 F.2d 377 (1960) ("Once he [defendant] goes beyond denial of the crime itself and testifies as to collateral matters he is under an *added* compulsion to tell the truth". *Id.* at 17, 283 F.2d at 381) (Emphasis original).

III. There was no error in admitting a prior inconsistent statement of June King.

(Tr. 83, 139, 154, 161, 163-164, 189-190, 196-197)

Appellant claims error in allowing introduction of a prior inconsistent statement of June King, the only other occupant of the room in which appellant, and the capsules in open view, were found, for no other reasons than it was "totally lacking in trustworthiness" and was "directly conclusory on the key disputed issue in the case" (Appellant's brief, p. 20, Arg. III, p. 18-22). We regard this claim, like others here, as wholly meritless.

Miss King testified charitably during direct examination that all the capsules found in her apartment belonged to her rather than to appellant[12] (Tr. 143, 145-146). In rebuttal, the prosecutor showed that shortly after her arrest she claimed just the opposite (Tr. 196). It is an elementary rule of impeachment that a witness

---

[10] Notably, appellant explained the circumstances of the offenses as well as of his entering the guilty plea (Tr. 112-113).

[11] *But cf. Proctor* v. *United States*, 131 U.S. App. D.C. 241, 404 F.2d 819 (1968) (*Miranda*); *Inge* v. *United States*, 123 U.S. App. D.C. 6, 356 F.2d 345 (1966) (*Mallory*); *White* v. *United States*, 121 U.S. App. D.C. 287, 349 F.2d 965 (1965) (*Mallory* remand).

[12] It had been earlier expected that she would be a Government witness (Tr. 83, 196-197) and though jointly indicted with appellant, she was allowed to plead guilty to a misdemeanor for possessing narcotic drugs (Tr. 139).

may be shown to have made statements relating to the same facts which are inconsistent with her present testimony. 3 Wigmore, EVIDENCE §§ 1000, 1017 (1940); McCormick, EVIDENCE § 34 (1954); 98 C.J.S., Witnesses § 573. See *Ewing* v. *United States*, 77 U.S. App. D.C. 14, 135 F.2d 633 (1942), *cert. denied*, 318 U.S. 776 (1943). The instant case provided a classic example. What appellant claims now as the indicia of the untrustworthiness[13] of her statement could only affect the possible weight that the jury might wish to give to it—not its admissibility which the trial court properly determined.

IV. The ruling to permit use of an affidavit by the prosecutor when a portion of it was used by the defense was not prejudicial.

(Tr. 41, 75, 77-85, 164-165, 168-176, 180A, 208-209)

Appellant claims that the court erred in ruling to allow the prosecutor to use an affidavit which appellant proposed to use to rehabilitate a witness. (Appellant's brief, pp. 23-26).

On cross-examination June King denied that she had ever stated to police officers that the narcotic capsules in her apartment belonged to appellant (Tr. 164-165).

---

[13] Apart from the fact that appellant feels that the prior inconsistent statement was untrustworthy merely because Miss King denied making them, he attempts to cast Miss King as a tragic victim of "coercive circumstances" (Appellant's brief, p. 22). It is enough to state that Miss King was fully advised of her rights prior to any questioning (Tr. 189-190) and she acknowledged then and at trial being advised of those rights and understanding them (Tr. 163-164, 190). Moreover, contrary to representation of appellant's defense counsel (Tr. 154), she admitted at the time of the questioning that she was not under the influence of narcotics and clearly understood what she was doing (Tr. 161). It would appear that appellant concedes the making of the statement by suggesting they were "self-serving" (Appellant's brief, p. 22). So they were. The Government's point was simply that they were made.

Appellant also bemoans the statement's "enormous prejudicial effect on the defense" (Appellant's brief, p. 20). Impeaching evidence is not to be excluded merely bcause it is damaging. See *Tate* v. *United States*, *supra* at 16, 283 F.2d at 380.

Although she had not yet been impeached (since the Government had not yet undertaken rebuttal), defense counsel sought to have Miss King read a part of a signed and sworn statement purportedly indicating that she had made a prior consistent statement, *i.e.*, that the narcotics capsules belonged to her (Tr. 170-171). When the prosecutor sought and received permission of the court to use another portion of the statement which indicated a gun was in the apartment,[14] defense counsel chose to forego this manner of rehabilitation and declined use of the statement entirely (Tr. 168-176).

We feel it is unnecessary to argue the propriety of the trial court's ruling in this respect because the very matter that defense counsel felt this ruling required her to withhold, the trial court in fact permitted her to introduce, perhaps even more convincingly, through the testimony of appellant's wife, Mrs. Holland, the least impeached witness in appellant's defense—and at the most effective time, after the Government's rebuttal (Tr. 180A, 208-209). She testified that Miss King called her about two weeks after the instant arrests to find out appellant's attorney so that she could admit to him that the seized drugs were hers, not appellant's. Mrs. Holland went on to relate that Miss King did in fact sign a sworn statement to this effect (the very same one from which defense counsel attempted to have Miss King read) in the office of appellant's lawyer (then Myer Koonin) with the lawyer's wife present (Tr. 208-209). Surely, the fact of the prior consistent statement could not have been established more clearly if Miss King had so testified herself. Thus, any error in the trial court's earlier ruling could not have prejudiced appellant's defense in the least.

---

[14] Inasmuch as appellant's hand was in a dresser drawer (which contained the gun) when the police entered the apartment (Tr. 41, 75), the theory was this evidence tended to show appellant's knowledge of things in the apartment (Tr. 41, 75, 77-85).

CONCLUSION

WHEREFORE, it is respectfully submitted that the judgment of the District Court should be affirmed.

THOMAS A. FLANNERY,
United States Attorney.

JOHN A. TERRY,
JOHN F. EVANS,
JULIUS A. JOHNSON,
Assistant United States Attorneys.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1970 406536 253